Supreme Court, U.S.
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No. 01-103

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,

v.

IZVESTIA NEWSPAPER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly held that service of process under a since-repealed Virginia statute on a defendant in Russia by first-class mail conflicted with a current treaty between the United States and Russia, a treaty consistently interpreted by the United States Department of State and the Russian government as requiring such service be made by letters rogatory.

RULE 29.6 STATEMENT

Respondent Izvestia Newspaper is not a legal entity, but rather is the newspaper publication *Izvestia*. Respondent Editorial Staff of Izvestia Newspaper is a misnomer for Open Joint Stock Company Editorial Staff Izvestia, a Ru[illegible] corporation. Open Joint Stock Company Editorial Staff Izvestia has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

In a state court action in Virginia, petitioner – a Russian national – obtained a $33.5 million default judgment against respondents – a Russian newspaper and its publisher (hereafter, collectively "Izvestia") – on a defamation claim arising from the publication of an article in Russia. Pet. 4-5; Pet. App. 8a-9a. When he initiated this action, petitioner chose to serve respondents through substituted service on the Secretary of the Commonwealth under Virginia's long-arm statute. Pet. 4. The Secretary then allegedly forwarded the process to respondents overseas via first-class mail, *see* Va. Code Ann. 8.01-329 (1997), a method lacking any proof of actual receipt. Respondents' three weeks to answer this action began not upon their alleged receipt of the process, but when the Secretary filed a certificate of compliance with the

trial court shortly after the alleged mailing. Va. Code Ann. 8.01-329 (1997).

This procedure closely parallels the discredited civil-law practice of *notification au parquet,* whereby actions against foreign defendants were commenced merely by depositing a writ with a local official who then attempted to notify them. *See Volkswagenwerk Aktiengesellschaft* v. *Schlunk,* 486 U.S. 694, 709 n.1 (1988) (Brennan, J., concurring) (citations omitted). Those actions proceeded whether or not the official succeeded. *Id.* The head of the United States delegation that helped to draft the Hague Service Convention referred to *notification au parquet* as an "'[i]njustice, extravagance, [and] absurdity. . . .'" *Id.* at 710 (quoting Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 Int'l Law 650, 650-651 (1968)).

More germane to this petition, however, is that petitioner's choice for service of process violated an active agreement between Russia and the United States governing service of process on Russian defendants. That agreement required that such service be via the verifiable medium of letters rogatory. *See* Exchange of Notes at Moscow Nov. 22, 1935; related Note of Jan. 19, 1937, 11 Bevans 1262 ("Exchange of Notes"); Pet. App. 15a-23a. Petitioner now asks this Court to intrude into the foreign relations power to declare that the Exchange of Notes is not the exclusive means of serving defendants in Russia. Implicitly, the petition also asks the Court to determine that service of process on overseas foreign defendants by untraceable first-class mail satisfies the Due Process Clause of the Fourteenth Amendment.

Appearing specially, Izvestia asks that the petition be denied. A ruling by the Court on these issues is neither necessary nor appropriate on this petition. First, only four months after petitioner filed this suit and attempted service, the Virginia General Assembly repealed the long-arm provision that authorized service by first-class mail. This

intervening legislation makes this a poor case for certiorari. Second, deferring to the well-settled construction given the Exchange of Notes by its signatories, the Virginia courts correctly ruled that service of process by first-class mail on Russian defendants was precluded. Third, the many state law irregularities committed by petitioner below – including, significantly, not providing the Secretary of the Commonwealth with the Russian translation of respondents' address – all demonstrate that this petition does not meet the rigorous standards for certiorari.

This petition seeks an extraordinary result. Simply put, the article at issue was published and read almost entirely within Russia. Petitioner nevertheless sought recovery in the United States. By doing so, petitioner contends that newspapers are subject to global liability from the sale of a few copies of their papers overseas or from publication of their articles on the internet, liability that can be initiated by the thin thread of service by first-class mail.

Such a result should give the Court pause. The risk that the Washington Post Company, because of the presence of a handful of copies of the *Washington Post*, could be subject to liability in Moscow or Benghazi could have a chilling effect on the dissemination of information and news here. Because of these significant First Amendment implications, a newspaper should, at a minimum, be proven to have received actual notice of a foreign action before such liability could be imposed.

STATEMENT OF THE CASE

Respondents publish *Izvestia*, a daily newspaper printed in Russia, Trial Tr. 34-35, written in Russian, *id.* 32, and distributed to approximately 2 million Russians daily, *id.* 40. Respondents have no contacts with Virginia. They have not entered any contracts, possessed any property, or transacted

any business in that state.[1] They do not sell or otherwise make *Izvestia* available in Virginia. *See id.* Contrary to petitioner's unsupported assertions, Pet. 4, other than some mention of an ability to obtain or read copies of *Izvestia* in Virginia, the record lacks any evidence of contacts between respondents and Virginia. Like major American papers, a few copies of *Izvestia* may find their way to other countries. To the extent those copies find their way to the United States and Virginia, however, they do so through the actions of others, not respondents. In sum, respondents have never purposefully directed their business activities to nor derived substantial revenue from Virginia.

Petitioner is a Russian national previously granted asylum in the United States. He claims that by 1992, when he was only 25, he owned four banks, the largest brokerage, and extensive real estate holdings in Russia. Trial Tr. 50-51. He claims to have been worth $300 million. *Id.* That same year, he claims that he was kidnapped by former KGB officials, who allegedly stole most of his assets. *Id.* 56. Ultimately settling in the United States, he was arrested in June 1996[2] and detained until July 1997 while fighting extradition to Russia on charges that he had embezzled over $8 million from a Russian bank. *Id.* 63-65.

Prior to September 16, 1997, petitioner granted numerous interviews for articles in such widely read newspapers as the *Village Voice*, *Washington Post*, and *Wall Street Journal*, and for a *60 Minutes* television segment. These news stories detailed the various crimes that petitioner was suspected of by the Russian government, the FBI, and the Federal

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[1] Amended Mot. of Def. Open-Joint Stock Co. Editorial Staff Izvestia to Vacate Default J., Ex. 1, Aff. N. Tanchevskaya ¶¶ 5-7.

[2] C. Burrell, *INS Arrests Couple Accused of Embezzling From Russian Investors*, Associated Press, June 28, 1996; P. Constable, *Russian Pair in Custody, Accused of Embezzlement*, Washington Post, June 29, 1996, at A2.

Reserve, crimes including embezzlement, money laundering, and racketeering.[3]

Despite these prior articles, to which he did not object, petitioner sued respondents for allegedly publishing similar allegations in the September 16, 1997 issue of *Izvestia*.[4] Though a resident of the District of Columbia, Mot. for J. ¶ 4, petitioner chose an unrelated forum – Virginia – to sue a Russian newspaper over stories published almost exclusively in Russia.[5] Ignoring the Exchange of Notes, petitioner requested service under Virginia's long-arm statute, Pet. 4, resulting in the process being transmitted overseas via first-class mail. Notably, had he sued either in the District of Columbia or in a United States district court, he would not have been able to use first-class mail service. Both those court systems require, at a minimum, that service on overseas defendants use a mail method that provides a signed receipt to evidence that the addressee actually received the process. Fed. R. Civ. P. 4(f)(2)(C)(ii); D.C. Super. Ct. R. 4(f)(2)(C)(ii).

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[3] *E.g.*, P. Constable, *From Russia With Chutzpah,* Washington Post, Aug. 18, 1996, at F1; J. Gould, *Gangster Bankers: A Young Russian's Run-ins with Organized Crime and Offshore Money Laundering,* Village Voice, Sep. 16, 1997; D. Farah, *Russian Crime Finds Haven in Caribbean,* Washington Post, Oct. 7, 1996, at A15; G. Simpson & D. Cloud, *Fed Probed Russian Bank Menatep in 1995*, Wall Street Journal, Sep. 3, 1999, at A4 ("The U.S. Federal Reserve in 1995 conducted an inquiry into possible illegal banking activities by Menatep, the Russian bank . . .. According to court documents, the 1995 Fed probe of Menatep concerned the activities of former Menatep Vice President Alexandre Konanykhine. . . .")

[4] Initially, petitioner also sought recovery for a December 1996 article that allegedly claimed he was a swindler. Mot. for J. ¶¶ 42-55. Petitioner abandoned this claim at trial.

[5] Initially, the suit listed four other defendants, none of whom had any relation to Virginia either. Those other defendants were a web-site operator in New Mexico, a reporter residing in New Jersey, and two reporters residing in Russia.

When respondents failed to answer the process, petitioner moved for entry of default. He then set the issue of damages for trial, never notifying respondents of the trial date. He then tried his case to a jury *ex parte*, dismissing the only two defendants who had appeared in the action – the last on the eve of trial – thereby ensuring that he would proceed *ex parte*.

Petitioner's maneuvers paid off. Including jury selection and deliberations, the trial lasted two to three hours. Trial Tr. 4. The evidence consisted of two exhibits and two witnesses. The jury returned a verdict of $3.5 million in compensatory damages and $30 million in punitive damages, the maximum amounts that the trial court permitted petitioner to seek. Trial Tr. 107-108.

After learning of the judgment, respondents appeared specially to challenge jurisdiction and to set aside the default verdict. After full briefing and oral argument, the trial court vacated the default and the default judgment because of petitioner's failure to serve process under the Exchange of Notes. Pet. App. 2a-3a. The trial court reaffirmed this ruling on rehearing. Respondents subsequently moved to dismiss the case for petitioner's continuing refusal to serve them properly within one year of commencing the action, as required by Virginia law. *See* S. Ct. Va. R. 3:3. The trial court granted that motion on August 25, 2000. Pet. App. 6a. Petitioner subsequently petitioned the Supreme Court of Virginia to review the decision of the trial court. After full briefing on the petition and oral argument by petitioner, the Supreme Court of Virginia declined review. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

I. INTERVENING STATE LEGISLATION MAKES THIS CASE ILL-SUITED FOR CERTIORARI

1. The Exchange of Notes aside, petitioner's attempted use of first-class mail to serve respondents had to satisfy due process for the judgment to be valid. To do so, such service

must have been "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Less than four months after petitioner attempted service, the Virginia General Assembly apparently decided that service by first-class mail was not so "reasonably calculated" and repealed the provision petitioner used. 1998 Va. Acts ch. 259 (adopted Apr. 7, 1998). In its place, Virginia now requires that substituted service on the Secretary of the Commonwealth be forwarded to defendants by certified mail, return receipt requested. Va. Code Ann. 8.01-329.

The General Assembly's action was prompted by the refusal of Maryland to award full faith and credit to a Virginia default judgment against Maryland residents who had allegedly been served by first-class mail. *See Miserandino* v. *Resort Properties, Inc.*, 691 A.2d 208, 220 (Md.), *cert. denied*, 522 U.S. 953 (1997). As the Court of Appeals explained in that case, service by first-class mail provided no indicia that service was actually received, *see id.* at 215, thereby rendering it constitutionally insufficient to confer personal jurisdiction on domestic non-residents of Virginia. The Virginia legislature promptly agreed. Nevertheless, petitioner now requests that this Court reinstate a vacated state court judgment based on the alleged constitutional sufficiency of first-class service on foreign defendants. Virginia's repeal of the very provision on which petitioner must rely to support his judgment establishes that this Court should not entertain the petition.

2. This Court need not be concerned about the purported conflict among the district courts concerning the scope of the Exchange of Notes. For while petitioner cites two cases that question the exclusivity of the agreement, both those cases are consistent with the principle enunciated in *Miserandino* and supported by the Virginia legislature's amendment of the

long-arm statute, namely that service on an overseas defendant has to be by a more effective method than first-class mail. In *Forum Financial Group, LLC* v. *President of Harvard College*, 199 F.R.D. 22 (D. Me. 2001), the court ordered that plaintiff personally serve the domestic attorney for the overseas defendant. And in *Filus* v. *LOT Polish Airlines*, 819 F. Supp. 232 (E.D.N.Y. 1993), the service was made under the Foreign Sovereign Immunities Act, which requires, at a minimum, that service be by a form of mail requiring a signed receipt. 28 U.S.C. 1608(a). Thus both cases acknowledge what petitioner chose to ignore: in personam jurisdiction over foreign defendants requires a verifiable means of service, whether or not the Exchange of Notes applies. Petitioner's use of first-class mail violated this principle, so the petition does not raise an issue substantial enough for this Court to grant the writ.

3. This petition squarely presents the very concern that underlies the opinion in *Miserandino* and the amendment of the Virginia long-arm statute, namely actually establishing that a non-resident defendant received notice of an action. Respondents do not concede that they ever received the process allegedly mailed by the Secretary of the Commonwealth or, in fact, answered it. In June 1998, respondents underwent a complete change in management.[6] At the time of that change and continuing until after the judgment, respondents' current management was unaware of this suit. *Id.* ¶¶ 5-6. Because of the change, respondents cannot ascertain if the alleged writing is authentic or whether it was sent in response to the process, to unofficial communications from petitioner's attorneys, or for some other reason. This state of affairs highlights the need for a traceable means of serving process on overseas defendants. In any event, Virginia law treats the writing as a nullity,

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[6] Pl. Konanykhine's Resp. to Amended Mot. of Def. Editorial Staff of Izvestia Newspaper Mot. to Vacate Default J., Ex. 8, Aff. N. Tanchevskaya ¶ 4.

because a corporation cannot appear *pro se* in a Virginia court. *Glumina Bank d.d.* v. *D.C. Diamond Corp.*, 527 S.E.2d 775, 776 (Va. 2000). Petitioner's avoidance of the procedures in the Exchange of Notes left the trial court with no means of determining whether a foreign newspaper had received actual service of a defamation suit that resulted in a multi-million dollar default judgment against it.

II. THE TRIAL COURT APPLIED THE SETTLED INTERPRETATION TO THE EXCHANGE OF NOTES AND REACHED THE CORRECT RESULT

1. The signatories' construction of the Exchange of Notes establishes that petitioner was required to serve respondents by letters rogatory. An exchange of notes is the constitutional equivalent of a treaty of the United States. *United States* v. *Belmont*, 301 U.S. 324, 331 (1937). This Court has stated that, to properly ascertain a treaty's meaning, it is appropriate to go beyond the text and consider such factors as its history, negotiations, and, of particular significance here, the construction given it by the parties. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943). Moreover "[t]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

Here, the United States and Russia have consistently interpreted the Exchange of Notes as being nearly exclusive, requiring that all service of process on Russian defendants by United States courts be via letters rogatory unless a Russian court – after a hearing – rules otherwise.

> Requests for service . . . in Russia may be accomplished only by means of letters rogatory. This was codified by an exchange of notes at Moscow on November 22, 1935 and a related note of January 19, 1937 (49 Stat. 3849; Executive Agreement Series 83).

U.S. Dep't of State Circular on Foreign Law, *Preparation of Letters Rogatory for the Use in Russia* (emphasis supplied); Resp'ts App. 1a.

> According to [a Supreme Soviet decree], which Russia has recognized since 1991, the one exception to service by letters rogatory is service by an agent or through international registered mail with prior permission from a Russia court.

Semtek Int'l, Inc. v. *Merkuriy Ltd.*, No. 95-11820-RCL (D. Mass. Aug. 13, 1996) (citing Presidium of Supreme Soviet of U.S.S.R., *Acknowledgement of the Decisions of Foreign Courts and Courts of Arbitration in the U.S.S.R.*, Decree No. 9131-XI, 26 Vedomosti SSSR item 427 (1988)). Pet. App. 37a.

The State Department's current website reiterates the continuing validity of this statement in *Semtek*:

> The service of United States judicial documents in Russia is usually effected by letters rogatory. . . .
>
> Legal documents may also be served by agent or through international registered mail. However, in accordance with the directive of the Supreme Soviet of June 21, 1988, compulsory service of legal documents is not possible by these means without prior permission from a Russian court. In this event, an open hearing is held (of which the defendant must be informed) to determine the suitability of the request. If the court grants its permission for service, a Russian Writ of Execution (Ispolnitelniy List) is issued, and the documents may be served through the requested means.

Judicial Assistance in the Russian Federation, at http://www.travel.state.gov/ russia legal.html (last visited Aug. 10, 2001). Resp'ts App. 4a.

Additionally, the Administrative Office of the United States Courts has recognized the mandatory nature of the Exchange of Notes since 1980:

> [W]e are requesting clerks of court to refrain from sending summonses and complaints by international mail to foreign defendants in those countries which have protested service by international mail, namely . . . the Union of Soviet Socialist Republics. *In those countries, letters rogatory are the appropriate mechanism for service.*

Memorandum of Gen. Counsel of Admin. Office of the United States Courts, *Service of Process in Foreign Countries* (Nov. 6, 1980) (emphasis in original). Resp'ts App. 9a.

In sum, here the United States and Russia completely agree: letters rogatory under the Exchange of Notes is virtually the sole method by which a United States plaintiff may serve a Russian defendant. The only exception does not include service by first-class mail, but like letters rogatory provides safeguards to ensure that the defendant receives actual notice of the suit. Though petitioner reads the language differently and argues that the Exchange of Notes does not delineate the exclusive means of service, under *Avagliano* the longstanding, contrary interpretations of the Department of State, the Administrative Office, and the Russian government are entitled to great weight and, in fact, are dispositive.

2. Having properly interpreted the Exchange of Notes, the trial court then also properly determined that the Exchange was still recognized by both signatories despite the fall of the Soviet Union. The United States still lists the Exchange of Notes in *United States Treaties and Other International Agreements*, which by law compiles all valid treaties and other international agreements. 1 U.S.C. § 112a. And Russia, having proclaimed that the treaties and agreements of

the Soviet Union would remain in force until further notice,[7] has never notified the United States that the Exchange of Notes is no longer recognized.

Thus, the Exchange of Notes remains a valid treaty binding on Virginia under the Supremacy Clause. U.S. Const. art. VI, cl. 2. Consequently, the trial court properly vacated the default resulting from petitioner's use of Virginia's long-arm statute rather than the Exchange of Notes to serve respondent. There is no need for this Court to grant the petition.

III. ADDITIONAL INDEPENDENT STATE LAW GROUNDS VOID THE VACATED DEFAULT JUDGMENT

This record is a particularly inappropriate platform for the Court. Simply put, this case is rife with petitioner's procedural defaults as a matter of Virginia law. For example, if Izvestia did file an answer, as petitioner contends, Pet. 4, then Virginia law required an additional notice to Izvestia of the trial date. S. Ct. Va. R. 3:17. Petitioner's failure to provide that date deprived respondents of their right to cross-examine petitioner's witnesses, rebut his evidence, ask for jury instructions, and argue damages to the jury. *Chappell* v. *Smith*, 156 S.E.2d 572, 574 (Va. 1967). Additionally, petitioner failed to assist the trial court by alerting it that over $29.6 million of the judgment exceeded Virginia's $350,000 limit on punitive damages. Va. Code Ann. § 8.01-38.1. Petitioner therefore permitted the court to enter a judgment that violated Virginia law.

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[7] Agreements Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 138, 145-146 (1992) ("The High Contracting Parties [Belarus, Russian Federation, and Ukraine] undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics.")

But the most significant error concerns the attempted service in this case. Petitioner provided the Secretary with only the English translation of respondents' address. This was crucial because not only do our two countries not share a language, we do not share an alphabet:

As requested:	Actual address:
18 Tverskaya Street, Building 1 Moscow K-6 GSP 103791 Russia[8]	ул. Тверская, дом 18, строение 1 103791 Москва К-6 ГСП Россия

Thus, petitioner essentially misaddressed the process here, trusting to fortune that the receiving Moscow post office might translate and properly deliver the parcel. As noted above, however, we cannot now determine whether respondents actually received this process.

Thus, were this Court to grant the writ and ultimately remand this case, the underlying result would likely be the same. Petitioner's judgment is so flawed that it will not stand up to further scrutiny by the Virginia courts. Accordingly, the petition does not present a compelling case for addressing the question presented.

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[8] Aff. for Service of Process on Sec'y of the Commonwealth.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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